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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 434

UNITED TRANSPORTATION UNION, as successor to the BROTHERHOOD OF RAILROAD TRAINMEN,
Petitioner,

v.

THE STATE BAR OF MICHIGAN,
Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Michigan.

JOHN J. NAUGHTON,
Attorney for Petitioner,
120 West Madison St., Suite 1200,
Chicago, Illinois 60602.

NELSON and WILSON,
Of Counsel for Petitioner,
1538 Commonwealth Building,
Detroit, Michigan 48226.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ——

UNITED TRANSPORTATION UNION, as successor to the BROTHERHOOD OF RAILROAD TRAINMEN, and all members, agents and officers of the Brotherhood of Railroad Trainmen in the State of Michigan,

Petitioner,

v.

THE STATE BAR OF MICHIGAN,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Michigan.

Petitioner, UNITED TRANSPORTATION UNION, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Michigan entered on March 9, 1970, and further prays that the said judgment be summarily reversed without remandment.

OPINIONS BELOW

The first opinion of the Circuit Court for the County of Jackson filed on September 12, 1962 (R. 135-138) is unreported and is printed as Appendix B hereto. The first opinion of the Supreme Court of Michigan (R. 448-449) is reported at 374 Mich. 152, 132 N.W. 2d 78 and is printed as Appendix C hereto. The second opinion of the Jackson Circuit Court entered after remand (R. 458-460) is unreported and is printed as Appendix D hereto. The second opinion of the Michigan Supreme Court and the dissent thereto (R. 497-511) is reported at 383 Mich. 201, 174 N.W. 2d 811 (1970) and is printed as Appendix E hereto.

JURISDICTION

The judgment of the Supreme Court of Michigan (R. 512) was entered March 9, 1970 and is printed in Appendix E hereto, infra page 41. The union's duly filed Petition for Rehearing was denied on May 4, 1970 (R. 572). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3), the Petitioner claiming rights under the Constitution of the United States and questioning the validity of the Michigan Statute relied upon to sustain the injunction affirmed.

QUESTIONS PRESENTED

1. Does a State Court Injunction conflict with rights guaranteed to railroad trainmen union members under the First and Fourteenth Amendments to the Constitution of the United States, when it enjoins such members from acts arguably involved in the union's basic plan affording

its members the opportunity to accept or reject union counsel to represent them in personal injury or death claims under the Federal Employers' Liability Act?

2. Is the granting of such an injunction prohibited by the decisions of this Court in *Brotherhood of Railroad Trainmen* v. *Commonwealth of Virginia, ex rel. Virginia State Bar,* 377 U.S. 1, 12 L. Ed. 2d 89, 88 S. Ct. 1113, 11 ALR 3d 1196 (1964) and *United Mine Workers* v. *Illinois Bar Association,* 389 U.S. 217, 19 L. Ed. 2d 426, 88 S. Ct. 353 (1967)?

3. Does the granting of that injunction based upon a Complaint filed in 1959 and on evidence heard in 1961 enjoining acts never pleaded nor proved deprive Petitioner of procedural due process?

STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

The Statute involved is §28.642 of the Michigan Statutes. The part relied on (R. 26) by the State Bar is printed in Appendix A hereto.

The Constitutional provisions involved are the First and Fourteenth Amendments to the Constitution of the United States which provide as follows:

AMENDMENT 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assembly, and to petition the Government for a redress of grievances.

AMENDMENT 14

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

a. *The Pleadings and How the Federal Questions Were Raised.*

This action was commenced by a Complaint filed on January 28, 1959 (R. 21). An Answer was filed on June 9, 1959 (R. 29) to which a Reply was filed (R. 40). The trial of the case in 1961 (R. 67-134) was basically a conflict between the two parties as to the legal effect of the positions set out in the 1959 pleadings. The State Bar supplemented its pleadings by means of one witness. The union rested without presenting evidence (R. 134).

The essential thrust of the Complaint was stated in paragraph 5 thereof (R. 23-24) charging the defendants with engaging in a "well-organized and systematized solicitation" of FELA Claims. Defendant denied the characterization alleged and pled:

> "Defendants aver that in many cases, but not in all, a member of the defendant Trainmen calls upon, contacts, or in some other manner explains to an injured member employee or his bereaved family, the advis-

ability of obtaining a lawyer, or the opinion of a lawyer, and recommends that they consult with the Legal Counsel designated, and further recommends that the Legal Counsel be retained if a lawyer is to be retained. Defendants further aver that some of the said members have represented, as was the fact in most cases arising in the Lower Peninsula of the State of Michigan, that the legal counsel will not charge in excess of twenty-five per cent (25%) of the amount of any recovery whether the recovery be effected by suit or settlement, and that this percentage would include expenses incidental to the investigation and any litigation of the claim."

Plaintiff also alleged that representatives of the Brotherhood were reimbursed for their time lost and their out-of-pocket expenses in bringing injured employees to the offices of the Brotherhood's attorneys (R. 14). In answer thereto, the Brotherhood stated that such reimbursement had continued up to March 31, 1959 but had been wholly discontinued by order of the president of the union on March 16 which order was to be effective on April 1, 1959 (R. 31-Para. 5).

A copy of the order of the president to all legal counsel is contained in the First Affirmative Defense of the Brotherhood (R. 33-34). In that Affirmative Defense, the Brotherhood pled that it was complying with the decision of the Supreme Court of Illinois which permitted the practices in which it was then engaged. *In re Brotherhood of Railroad Trainmen,* 13 Ill. 2d 391, 150 N.E. 2d (1958). Plaintiff's reply to this Affirmative Defense (R. 43-45) did not deny any of the factual allegations, but denied the legal conclusion that the case was moot and further denied that compliance with the Illinois decision was certain and averred that compliance with the Illinois decision would, nevertheless, be a violation of the Michigan statute pro-

hibiting solicitation of personal injury and death claims, which statute was pleaded in paragraph 11 of the Bill of Complaint (R. 25-26). Defendant denied the Michigan statute applied to it and, in their Third Affirmative Defense (R. 35) stated that any application of the said statute to apply to the Brotherhood Plan would be contrary to rights granted by the Railway Labor Act and by the Constitution of the United States.

Plaintiff sought an injunction permanently enjoining the Brotherhood of Railroad Trainmen in only one respect, specifically from engaging in the solicitation of Federal Employers' Liability Claims in the State of Michigan (R. 27). Plaintiff similarly claimed that it was entitled to an injunction against "solicitation" in its statement of claim (R. 62-63).

Defendant Brotherhood in its Concise Statement of Defense stated, among other things, that the State Bar was attempting to enjoin the Brotherhood on the basis of selected statements from the Illinois Supreme Court Opinion alleged as facts though the allegations were based solely on information and belief; that there was no violation of the Michigan statute; and that the Brotherhood's Plan was protected by rights granted by the Constitution of the United States of America, by federal statutes, and by considerations of public policy (R. 65-67).

b. *The Trial and the Exhibits.*

On June 27th, 1961 the trial opened with counsel for the parties present (R. 67). The first 34 pages of the 86 page transcript of this trial are occupied with an Opening Statement for the State Bar consisting largely of exchanges between counsel and abstractions from their discussions of the Bill of Complaint (R. 68-94).

Near the close of the Opening Statement, counsel for the State Bar said:

> "***We haven't offered *any proof as to disputed matters.* We do not intend to.***" (Italics added R. 93)

The State Bar offered as its only witness David J. Walsh (R. 94) who testified that he was Supervisor of the Clearing House for the Claims Research Bureau, General Claims Division, of the Association of American Railroads, which is comprised of railroads operating in the United States (R. 95). The records of the Association of American Railroads had been kept under his supervision since July 1, 1953 and it was the regular course of his business to keep the records (R. 95). He had with him the records of claims of Michigan residents under the FELA against railroad members of the Association (R. 96).

On FELA cases arising in Michigan from July 1, 1953 to March 31, 1955, the Brotherhood's counsel objected on the ground that they are incompetent, irrelevant and immaterial (R. 96). To this objection (R. 449) counsel for the State Bar replied that:

> "The *only issue* in this case as we see it*** is whether or not a large volume of these cases arising in Michigan reached the office of Regional Counsel Henslee and associates in Chicago over a period of several years during the operation of this legal aid department. That is placed in issue in our bill and denied by the answer, and this is evidence offered in support of the bill" (R. 96). (Emphasis supplied.)

The cards testified to came from unidentified sources compiled under the supervision of the witness. These cards were submitted and reports made to the organization of the witness, the Claims Research Bureau, during periods from July 1, 1953 through December 31, 1960.

However, the said cards referred to accidents and settlements made outside the periods, for example: The claim of Richard F. Baker was for an accident suffered on April 26, 1946 and presumably was settled in that year (R. 183) though it was reported to the Claims Research Bureau on December 22, 1953.

On cross examination, the witness testified that he had no personal knowledge of the material contained in the cards. After the defendant's motion to dismiss at the close of the plaintiff's case was denied, the defendant rested.

c. *The 1962 Decision and Decree*

The trial court's decision (R. 135-139, Appendix B) held that the "***recommendation of counsel by the Brotherhood is the nub of the proceedings*** the right of freedom of speech being basically involved" (R. 136). The injunctive provisions of the Decree enjoined the Brotherhood in six respects relating to the procurement, within the State of Michigan, of a lawyer to render "any" legal services (R. 142-143). These injunctive provisions essentially prohibited the making of unsolicited calls upon a "person" or his representative for the purpose of arranging for the employment of a lawyer or for the purpose of furnishing a lawyer to such person or representative.

d. *The Mandate of the Michigan Supreme Court.*

The 1962 Decree was appealed but before argument, the United States Supreme Court handed down its Opinion in *Brotherhood of Railroad Trainmen* v. *Commonwealth of Virginia, ex rel. Virginia State Bar,* 377 U.S. 1, 12 L. Ed. 2d 89, 88 S. Ct. 1113 (1964). The Michigan Supreme Court thereupon remanded to the Circuit Court stating (R. 449, Appendix C) at 374 Mich. 152, 132 N.W. 2d 78, 79 (1965):

"Now that the Supreme Court has decided the Virginia Case, we find no alternative other than that of reversal and remand, as in the Virginia Case, for proceedings in the Jackson Circuit not inconsistent with the Supreme Court's said opinion. It is so ordered, with no award of costs as to either court.

"Since a public question of moment is involved, we remand with permission for amendment of plaintiff's bill to seek, if it be so advised, relief not inconsistent with the Supreme Court's said opinion."

e. *Proceedings on Remand*

After remand, a motion was made for further proceedings by the State Bar (R. 450). This motion was heard on February 5, 1965 with counsel for the State Bar stating: "The plaintiff does not care to amend the Complaint. . .". Defendant insisted upon the amendment of that Complaint and the matter was taken under advisement (R. 472-483), with briefs being filed on both sides. No ruling was ever made on that motion.

In April of 1968, a motion for judgment was made (R. 454-456). The hearing was had on May 3, 1968. The State Bar urged the adoption of a Decree entered in the State of Virginia after remand by the United States Supreme Court of Appeals of the State of Virginia (R. 483). In response, the Brotherhood stated that the mandate of the Supreme Court of Michigan required the filing of a new Complaint, that the Decree was contrary to the *Brotherhood of Railroad Trainmen decision,* and that the *United Mine Workers* case handed down by the United States Supreme Court in December of 1967 was also directly relevant (R. 484). The trial court denied these contentions of the *Brotherhood.* It entered its Opinion and Order, and Decree on May 24, 1968 (R. 458-461).

In that Opinion, the court dismissed all of the individually named defendants and entered its Decree against the *Brotherhood of Railroad Trainmen* and all of its agents and officers in the State of Michigan (R. 459). The court stated that the Supreme Court of Virginia had modified the Decree entered on remand by the Virginia trial court in *Brotherhood of Railroad Trainmen* v. *Commonwealth of Virginia, ex rel. Virginia State Bar*, 207 Va. 182, 149 S.E. 2d 265 (1966). The court distinguished the *Mine Workers* case as being limited to the hiring of attorneys on a salary basis and stated that its Decree was in conformity with the interpretation of the Supreme Court mandate as made by the Virginia Supreme Court (R. 459, Appendix D).

On appeal the Michigan Supreme Court affirmed the 1968 injunction. In its Opinion (Appendix E) the Michigan Supreme Court, while indulging in language which is most turgid, appears to hold that it was compelled to affirm the decree because of the fact that it is similar to a decree affirmed as modified by the Virginia Supreme Court of Appeals at 207 Va. 182, 149 S. E. 2d 265.

The Brotherhood of Railroad Trainmen and other national railway operating unions were negotiating with a view towards merging while plaintiff was moving for judgment in this case. Since the Decree was entered, a referendum vote was held among the membership of the organizations and on January 1, 1959, the Brotherhood of Railroad Trainmen merged into a newly created union, the United Transportation Union, along with the Brotherhood of Locomotive Firemen and Enginemen, the Order of Railway Conductors and Brakemen and the Switchmen's Union of North America. This petition is made by the successor union.

REASONS FOR GRANTING THE WRIT

I.

THE MAJORITY OPINION AND JUDGMENT SERIOUSLY RESTRICTS THE PETITIONER'S RIGHTS OF FREEDOM OF SPEECH, PETITION AND ASSEMBLY UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE FEDERAL CONSTITUTION AND IS CONTRARY TO IMPORTANT DECISIONS OF THIS COURT.

The decree here involved was entered with the purpose of interfering with the railroad workers in the exercise of their constitutional rights. It was further entered with the purpose of granting the same relief in Michigan as had been granted in Virginia. (This is said to be required by the principle of "'equal justice under law," a principle accorded the State Bar alone and never considered as applying to the union, Appendix E, p. 37). It is submitted that the entry of the decree in such circumstances obviously offends constitutional freedoms of speech, petition and assembly and alone requires both the granting of the writ of certiorari and the summary reversal of the judgment below without remandment.

The opinion below recognizes that this Court not only reversed certain sections of the Virginia injunction of 1962 but further recognizes that this Court remanded with instructions that the basic plan must not be affected or forbidden by the other sections and that the lawyers involved must be accorded "a like protection." Despite this recognition, the majority opinion in the court below never discusses any of the injunctive provisions but instead defers to the 1966 Opinion by the Virginia Supreme Court of Appeals.

In discussing that case, the court below states that it does not rely on "the fact" that the Brotherhood's petition for certiorari was denied. The fact is, however, that it was the Virginia State Bar's Petition which was denied (385 U.S. 1027). After remandment and entry of the modified decree by the trial court, the Brotherhood petitioned for leave to appeal which was denied upon technical grounds.[1] The dubious value of that case as precedent renders the reliance thereon by the majority opinion even more unwarranted.

The decretal judgment entered, moreover, contained no findings of fact unlike the Virginia decree from which it was copied. (The Virginia findings affirmed in 1966 surprisingly contained findings of "solicitation" and of the "unauthorized practice of law" despite this Court's holding to the contrary.) On the other hand, the prior 1962 Michigan findings of fact (R. 139-142) would not aid the decree since the plan was basically found to violate the Michigan statute prohibiting "solicitation." In 1962, the trial court stated (R. 136):

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1. The Order entered on March 6, 1968 reads as follows:
"The petition of Brotherhood of Railroad Trainmen for an appeal from a decree entered by the Chancery Court of the City of Richmond on the 20th day of June, 1967, in a certain chancery cause then therein depending, wherein the Commonwealth of Virginia, ex rel. Virginia State Bar was plaintiff and said petitioner was defendant, having been maturely considered and a transcript of the record of the decree aforesaid seen and inspected, the court being of opinion that the appeal was not perfected in the manner required by law, in that the petitioner in effect seeks an appeal from the final order entered by this court on June 13, 1966 (207 Va. 182, cert. denied, 385 U.S. 1027), doth reject said petition and refuse said appeal."

> "The problem of recommendation of counsel by the Brotherhood is the nub of the proceedings presently before this Court, the right of freedom of speech being basically involved."

After this Court confirmed that analysis in 1964 Brotherhood, the trial court ignored it in 1968 and deferred to Virginia in entering the present decree. In doing so, it refused to require the State Bar to amend its Complaint to seek the expanded relief which it obtained despite the petitioner's protests (R. 471, 471, 484) and despite the remandment order of the Michigan Supreme Court requiring such an amendment. Instead, the State Bar was permitted to wait 3 years before submitting the present decree on the ground that it had a privilege or an election not to ". . . . avail itself of the accorded right to amend" (Appendix E, p. 35). This alternative was not pointed out to Petitioner until it received the Majority Opinion.

The lack of substance to Respondent's case at this point was typical. The case began in 1959 by the filing of a Complaint which paraphrased certain language from the decision of the Illinois Supreme Court. See, *In Re Brotherhood of Railroad Trainmen,* 13 Ill. 2d 391, 150 N.E. 2d 163 (1958). That paraphrasing alleged only a pattern of "solicitation" (R. 21-27). No evidence was introduced in support of those allegations other than some cards received by the Association of American Railroads (R. 178-446). On this point, as on all points, the dissent says it all. No injunction shoud be granted on such stale proofs which do not sustain the relief granted (Appendix E, p. 44).

The instant case is not merely theoretical. The six specific injunctive provisions, most assuredly, can be used to stultify the legal services plan of the Petitioner even

though this Court has already held that Plan to be constitutionally protected. On the other hand, the State Bar has failed to show any "appreciable public interest" requiring the injunctive provisions entered. That being so, the injunction should be stricken down.

The first injunctive provision prohibits ". . . giving or furnishing legal advice to . . . members or their families . . ." (Appendix E, p. 41). That provision strikes at the heart of the Petitioner's plan. As this Court stated in *Brotherhood of Railroad Trainmen* v. *Virginia*, 377 U.S. 1, 5, 6:

> "It cannot be seriously doubted that the First Amendment's guarantees of free speech, petition and assembly give railroad workers the right to gather together for the lawful purpose of helping and advising one another in asserting the rights Congress gave them in the Safety Appliance Act and the Federal Employers' Liability Act, statutory rights which would be vain and futile if the workers could not talk together freely as to the best course to follow. The right of members to consult with each other in a fraternal organization necessarily includes the right to select a spokesman from their number who could be expected to give the wisest counsel. That is the role played by the members who carry out the legal aid program. And the right of the workers personally or through a special department of their Brotherhood to advise concerning the need for legal assistance—and, most importantly, what lawyer a member could confidently rely on—is an inseparable part of this constitutionally guaranteed right to assist and advise each other."

Petitioner also objects to each of the remaining 5 injunctive provisions on similar grounds. Each can be misconstrued by the railroads to strike at the heart of the plan. Each can be used to chill the exercise of constitu-

tional rights. For instance, the second finding is an attempt to threaten Petitioner's members with contempt on the ground that they have aided "any lawyer" to "obtain legal employment." Moreover, this provision was modified into its present form by the Virginia Supreme Court stating that the lawyers involved could only "accept" employment under its interpretation of this Court's language. It then states [*Brotherhood of Railroad Trainmen* v. *Commonwealth of Va. ex rel. Virginia State Bar*, 207 Va. 182, 149 S.E. 2d 265, 271, 272]:

> "By another assignment of error, the Brotherhood objects to the portion of the 1965 decree enjoining the Brotherhood
>
> 'from informing any lawyer or lawyers or any person whomsoever that an accident has been suffiered by a member or non-member of the said Brotherhood and furnishing the name and address of such injured or deceased person for the purpose of ob-obtaining legal employment for any lawyer.'
>
> This injunction is directed against the furnishing of information for the purpose of enabling lawyers to solicit legal employment. The majority opinion upholds the workers' 'constitutionally guaranteed right to assist and advise each other' (377 U.S. at 6, 84 S. Ct. at 1116, 12 L. Ed. 2d at 93). It does not, in our opinion, give the Brotherhood the right to take action that is designed to enable lawyers to solicit employment. We therefore overrule the Brotherhood's objection, except insofar as it relates to the words 'or any person whomsoever.' After those words are deleted, the injunction will clearly restrain only actions designed to assist lawyers in running and capping for themselves.

The fine distinction, of course, is not known, if ascertainable, to the members of Petitioner in Michigan. Nor are such members able to evaluate the conflict between

that language and this Court's language on the same point. The acceptance of the Virginia Opinion, which lacks a willingness to accept this Court's mandate in *Brotherhood,* is clearly unwarranted.

In summary, as the dissent states, the decretal judgment is not consistent with this Court's Opinion in *Brotherhood of Railroad Trainmen* v. *Commonwealth of Va. ex rel. Virginia State Bar,* 377 U.S. 1, 12 L. Ed. 2d 89, 88 S. Ct. 1113, 11 ALR 3d 1196 (1964) [Appendix E, p. 44].

When *United Mine Workers* v. *Illinois Bar Asso.,* 389 U.S. 217, 19 L. Ed. 2d 426, 88 S. Ct. 353 (1967) is considered it is clear that the judgment below grossly and erroneously restricts the Petitioner's constitutional rights. As the dissent below states ". . . it seems clearly evident that the decree is in plain violation of the holding of the United States Supreme Court in *United Mine Workers* (Appendix E, p. 44)

The majority below, nonetheless, seeks to distinguish Mine Workers on the ground that it involved a "financial connection" not present in the instant case. Incredibly, this was the same ground relied on by the Illinois Supreme Court which was reversed by this Court. The attempted distinction further flies in the face of this Court's statement at 389 U.S. 224:

> "Nor can the case at bar be distinguished from the Trainmen Case in any persuasive way."

In fact, the attempted distinction is wholly groundless. The injunction below prohibits mainly any financial connection between the Petitioner and its counsel. Both plans are equally in violation of the first provision of the injunction below, i.e., both *Mine Workers* and *Trainmen* involve the "giving or furnishing of legal advice." There can be no closer financial connection between a union and its coun-

sel than the employment of counsel on a salary as in Mine Workers. Since this is permitted and the union here may decide to modify its plan in such fashion in the future, it is astounding to find the Majority Opinion attempting to distinguish the cases on that ground.

The further statement by the Majority Opinion, it is submitted, shows clearly that this distinction was not truly relied upon but was instead another example of an unwillingness to follow the decisions of this Court. This is clearly shown when the Court states (Appendix E, p. 40):

> "Here we decline to extend or apply *Mine Workers* to our question; a question which in 1965 was sent back to the Jackson circuit for consistency with the 1964 *Brotherhood Case*—that only."

Indeed, the Supreme Court of Michigan shows a disregard of the Opinions of this Court which borders on contempt when it states (Appendix E, p. 39):

> "In short, this Court is not ready—absent a specific order forwarded from Washington—to grant the Brotherhood more relief in Michigan than it has obtained thus far in Virginia."

It is respectfully submitted that this Court should send such a specific order back to Michigan by granting the Petition for Writ of Certiorari and by summarily reversing the injunction without remandment.

II.

THE OPINION AND JUDGMENT BELOW BEING BASED UPON ACTS NEVER PLEADED NOR PROVEN AND WITHOUT A HEARING DEPRIVES THE PETITIONER OF ITS CONSTITUTIONAL RIGHT TO PROCEDURAL DUE PROCESS.

The case began in 1959 with the paraphrasing of an Opinion of the Illinois Supreme Court in a Complaint

which was based upon a Michigan Statute prohibiting the "solicitation of legal business." This is the only pleading upon which the judgment below could be based. It is, however, quite clear that the statute no longer retains any validity or any applicability to the Petitioner's union, both because of this Court's decision in *Brotherhood of Railroad Trainmen* v. *Commonwealth of Virginia, ex rel. Virginia State Bar,* 377 U.S. 1, 12 L. Ed. 2d 89, 88 S. Ct. 1113, 11 ALR 3d 1196 (1964) and because of this Court's prior decision in *N.A.A.C.P.* v. *Button,* 371 U.S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963). In *Button,* a similar statute was stricken down because of its overbreadth as to the furnishing of legal services by the association there involved.

Here, there are no findings of fact (unlike the Virginia Decree which was copied) and there are no allegations in any pleading relating to the injunctive provisions entered in the Decree. Moreover, there is no evidence establishing any such matters. In such circumstances, the Decree entered is not only contrary to the decisions of this Court but is also so gross as to offend constitutional guarantees of due process. Where an injunction decree is not based upon the pleadings and is not supported by proof, it is clear that the court is without any jurisdiction to issue it. Even where there has been proof of the commission of unlawful acts, other unlawful acts disassociated from those proven should be stricken from an injunction decree. *State of Wyoming* v. *State of Colorado,* 286 U.S. 494 (1932); *NLRB* v. *Express Publishing Company,* 312 U.S. 426 (1941); and *Communication Workers* v. *NLRB,* 362 U.S. 479 (1960). When a proceeding has been instituted based upon particular charges, it is a denial of procedural due process for the court to enter a decree based upon

charges not originally made. Procedural due process requires fair notice of the charge. *In re Ruffalo,* 390 U.S. 544, 88 S. Ct. 1222, 20 L. Ed. 117 (1968).

It is no assistance for the court below to state that the State Bar had an election as to how it chose to proceed, either by amendment or by awaiting the decision of the Virginia Supreme Court of Appeals to see if it was favorable. This is especially so since the prior order of the Michigan Supreme Court (Appendix C) did not set out any such alternative but, instead, stated that the State Bar was granted leave to amend the Complaint if it decided to seek relief not inconsistent with the 1964 Brotherhood case.

It is, of course, contrary to elementary standards of justice to change the theory on which the case is tried after trial. It is equally contrary to elementary standards of justice to enter an injunction without any allegations, without any evidence or without any findings of fact in support thereof. The said action of the trial court went beyond its jurisdiction and was offensive to procedural due process. If charges had been made, procedural due process would also have required a hearing so that the Petitioner could have the opportunity to rebut the charges. It is respectfully submitted that for this reason alone, the Petition for Writ of Certiorari should be granted and the judgment should be summarily reversed without remandment. *Willner* v. *Committee on Character and Fitness,* 373 U.S. 96, 83 S. Ct. 1175, 10 L. Ed. 2d 224, 2 ALR 3d 1254 (1963).

CONCLUSION

For the reasons adverted to above and because of the demands of law and of substantial justice, the Petition for Writ of Certiorari should be granted and, after the granting of the writ, the Judgment and Opinion of the Supreme Court of Michigan should be reversed per Curiam without remandment.

Respectfully submitted,

JOHN J. NAUGHTON,
120 West Madison St., Suite 1200,
Chicago, Illinois 60602,
Attorney for Petitioner.

NELSON and WILSON,
1538 Commonwealth Building,
Detroit, Michigan 48226,
Of Counsel for Petitioner.

July —, 1970

APPENDIX A

§28:642 of the Michigan Statutes:

"Any person, firm, co-partnership, association or organization of any kind, either incorporated or unincorporated, or any of the officers, agents, servants, employees, or members of any such person, firm, co-partnership association or organization of any kind, either incorporated or unincorporated, or of any division, bureau or committee of such association or organization, either incorporated or unincorporated, who shall directly or indirectly, individually, or by agent, servant, employee or member, solicit any person injured as the result of an accident, his administrator, executor, heirs or assigns, his guardian, or members of the family of the injured person, for the purpose of representing such person in making claim for damages or prosecuting any action or causes of action arising out of any personal injury claim against any other person, firm or corporation, or to employ counsel for the purpose of such solicitation, shall be guilty of a misdemeanor***."

APPENDIX B

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF JACKSON, IN CHANCERY.

THE STATE BAR OF MICHIGAN,
Plaintiff,
vs.
THE BROTHERHOOD OF RAILROAD TRAINMEN,
Defendants.

Number T-640
DECISION

This is an action based on a bill of complaint filed in behalf of the State Bar of Michigan on January 28, 1959. Answer thereto was filed on behalf of the defendants on June 9, 1959. A reply was filed by plaintiff on June 16, 1959. Suffice it to say that subsequent amended pleadings were withdrawn.

It was agreed between counsel that the record in this case should be transcribed before the filing of briefs. This was completed, and the matter was ready for disposition by this Court approximately May 1, 1962, including a motion to strike a portion of plaintiff's reply brief having to do with decrees entered in similar situations in other jurisdictions.

With reference to the motion to strike, the same is hereby denied, as this Court may consider any authorities it deems applicable.

An examination of the aforesaid pleadings discloses in substance that the practices complained of were in exis-

tence up to May 31, 1959. It is the claim of defendants that they have been in compliance with the decree entered in the case of *In re Brotherhood of Railroad Trainmen* as reported in 150 Northeastern, 2d Series, at page 163, as evidenced by the letter of March 16, 1959, as set forth in the first affirmative defense, from W. P. Kennedy, President, and directed to all lodges and members and to all legal counsel, Brotherhood of Railroad Trainmen. Because of the indefiniteness and uncertainty therein in relation to the practices complained of, such a defense position is untenable.

In the aforesaid Illinois case, among other rulings and directives, it was held as follows:

> "The objective of the Brotherhood in seeking to secure competent legal representation of its members can be accomplished without lowering the standards of the legal profession. The Brotherhood has a legitimate interest in investigating the circumstances under which one of its members has been injured. That interest antedates the occurrence of any particular injury. We are of the opinion that the Brotherhood may properly maintain a staff to investigate injuries to its members. It may so conduct those investigations that their results are of maximum value to its members in prosecuting their individual claims, and it may make the reports of those investigations available to the injured man or his survivors. Such investigations can be financed directly and without undue burden by the 218,000 members of the Brotherhood.
>
> "The Brotherhood may also make known to its members generally, and to injured members and their survivors in particular, first, the advisability of obtaining legal advice before making a settlement and second, the names of attorneys who, in its opinion, have the capacity to handle such claims successfully."

The probem of recommendation of counsel by the Brotherhood is the nub of the proceedings presently before this Court, the right of freedom of speech being basically involved.

This same matter has been before the courts of the states of Illinois, Iowa, Oklahoma, Virginia, Nebraska, and Missouri. The majority of these states, in one form or another, have approved the decision of the Illinois Supreme Court, Missouri being the only state to prohibit it, and the State of Virginia prohibiting recommendation of any particular counsel.

This Court feels that the plaintiff is entitled to relief.

Plaintiff has submitted a proposed decree with which this Court is in accord, with the following exceptions:

1. The word "all" at the end of line 4 of paragraph 6 on page 3 will be deleted.

2. Subparagraph (d) on page 5, the last line thereof, will be rephrased as follows: "the employment of any particular lawyer or group of lawyers by such person."

3. Subparagraph (e) on page 5 is approved but hereby designated as "subparagraph (f)," and in place and stead thereof shall be inserted subparagraph (e), as follows: (e) Engaging in any activity, conduct, or endeavor condemned by the Supreme Court of Illinois in the opinion above referred to."

I should not close without adding the following:

The first affirmative defense is without merit. See *Seifert* v. *Buhl Optical Company,* 276 Michigan, 692, and cases therein cited.

The third affirmative defense is without merit, as is set forth in the Illinois case aforesaid.

Upon the above corrections and additions being made, a decree accordingly will be subscribed and enrolled in this court.

I believe that I should make the following observation with reference to subparagraph (e), having to do with the decision of the Illinois Supreme Court, and that is that although certain specific activities and conduct as contained in the Illinois decision were not specifically pleaded in the instant suit, nevertheless, by the defendants' answer, they have been indirectly injected into this litigation and should be covered by the Court's order.

As requested by the office of Mr. Arthur C. Lumley, a copy of this opinion is being forwarded to the office of Henslee & Henslee in Chicago, Illinois.

(Signed) JOHN C. DALTON
John C. Dalton,
Circuit Judge.

Dated: September 12, 1962.

APPENDIX C

STATE OF MICHIGAN

SUPREME COURT

THE STATE BAR OF MICHIGAN,

Plaintiff and Appellee,

v.

THE BROTHERHOOD OF RAILROAD TRAINMEN,

Defendants and Appellants.

BEFORE THE ENTIRE BENCH
BLACK, J.

Plaintiff's bill was filed January 28, 1959, in the Jackson Circuit. It was designed to obtain relief corresponding to that which was sought about the same time by the Virginia State Bar, against the same defendant Brotherhood, in the chancery court of Richmond, Virginia. For the history of the Virginia Case, and for understanding of its ultimately controlling effect here, we refer to Brotherhood of *Railroad Trainmen* v. *Virginia ex rel. Virginia State Bar,* —— *U.S.* ——, 12 L. Ed. 2d 89, 84 S. Ct. ——, decided April 20, 1964.

The Jackson county circuit court ruled in favor of the plaintiff State Bar, finding as applicable certain then unreversed and apparently controlling lower court decisions. The circuit court concluded:

> "This same matter has been before the courts of the states of Illinois, Iowa, Oklahoma, Virginia, Nebraska, and Missouri. The majority of these states, in one form or another, have aproved the decisions of the Illinois Supreme Court, Missouri being the only state to prohibit it, and the State of Virginia prohibiting recommendation of any particular counsel."

"This court feels that the plaintiff is entitled to relief."

Decree below, entered under date of September 14, 1962, enjoined the defendants in much the same manner as was done by the chancery court of Richmond. The defendants having appealed from such decree, and it appearing that submission to the Supreme Court of the Virginia Case was then imminent, order entered here January 2, 1964 as follows:

"On reading and filing appellants' [illegible]er 26 motion for continuance, and upon considera[illegible] the summary appearing in 32 LW 3006 pertaining t[illegible]ke questions that are due for January argument in the case identified below;

"It is ordered that submission of this cause on appeal be and the same is hereby continued pending final determination, by the Supreme Court of the United States, of the case of *Railroad Trainmen* v. *Virginia State Bar,* Docket 34, certiorari granted 9 L. Ed. 2d No. 7, p. 715.

"It is further ordered that appellants' motion for certification of this cause, to the Supreme Court, be and the same is denied."

Now that the supreme court has decided the Virginia Case, we find no alternative other than that of reversal and remand, as in the Virginia Case, for proceedings in the Jackson circuit not inconsistent with the Supreme Court's said opinion. It is so ordered, with no award of costs as to either court.

Since a public question of moment is involved, we remand with permission for amendment of plaintiff's bill to seek, if it be so advised, relief not inconsistent with the Supreme Court's said opinion.

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*The Virginia Case, to which the circuit court referred, was of course the decision which per foregoing citation was reviewed and reversed by the Supreme Court.

APPENDIX D

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR

THE COUNTY OF JACKSON

THE STATE BAR OF MICHIGAN,
Plaintiff,

vs.

THE BROTHERHOOD OF RAILROAD TRAINMEN,
Defendants

No. T-640
OPINION AND ORDER

Pursuant to the directive of the supreme court of this state in the case of *State Bar of Michigan* v. *Brotherhood of Railroad Trainmen*, 374 Michigan, 152, 155, this matter was noticed for hearing before this Court for entry of an order not inconsistent with the United States Supreme Court opinion in *Railroad Trainmen* v. *Virginia Bar*, 377 U.S. 1, 12 L. Ed. 2d, 89.

Motion for judgment in accordance with the foregoing was argued before this Court by both counsel on May 17, 1968.

Subsequent to entry of the United States Supreme Court decision aforesaid, this matter once again came before the Supreme Court of the State of Virginia on June 13, 1966, (re hearing denied September 13, 1966) and upon which case certiorari to the United States Supreme Court has also been denied, wherein the said Supreme Court of the State of Virginia made its determination of what would be a proper order under the mandate of the United States Supreme Court.**

Upon argument before the Court, considerable stress was laid upon the holding of the United States Supreme Court in *United Mine Workers* v. *Illinois Bar Association*, 19 L. Ed. 2d, 426, wherein it was held that the First and Fourteenth Amendments gave the mine workers the right to hire attorneys on a salary basis to assist its members in the assertion of their legal rights.

As pointed out in the footnotes on page 428, the opinion and holding was limited to this one aspect of the union's activities.

It must also be kept in mind that the same general principle; that is, actual payment of the attorneys by the association involved, had been before the United States Supreme Court in the case of *NAACP* v. *Button*, 371 U.S. 415, 9 L. Ed. 2d 405.

There is nothing in the *United Mine Workers* Case which would prohibit or change entry of the proposed order which is in conformity with the interpretation of the supreme court mandate as made by the Virginia Supreme Court.

Also before this Court were two motions to dismiss as to individually-named defendants, with the exception of L. M. Hasbrouck, Raymond Fieberkorn, and R. J. Johnson.

Said motions to dismiss are hereby granted, and it is so ordered.

For the reason that this is a class action and that there are only the above three named individual defendants remaining in this matter, this Court hereby, *sua sponte*, orders this matter dismissed as to the remaining three also.

So there will be no misunderstanding, the remaining defendants herein are The Brotherhood of Railroad Trainmen in the State of Michigan.

Counsel for plaintiff is hereby directed to redraft the proposed judgment submitted to this Court, omitting from the title thereof the individually-named defendants against whom this action has now been dismissed, and present said corrected judgment forthwith to this Court for signature.

It is so ordered.

(Signed) JOHN C. DALTON

John C. Dalton,
Circuit Judge.

**Addendum:

The 1966 Virginia case above referred to is *Brotherhood of Railroad Trainmen* v. *Commonwealth,* 207 Virginia, 182; 149 S.E. 2d, 265.

Dated: May 24, 1968.

APPENDIX E

STATE OF MICHIGAN

SUPREME COURT

THE STATE BAR OF MICHIGAN,

Plaintiff and Appellee,

v.

THE BROTHERHOOD OF RAILROAD TRAINMEN, and all other members, agents and officers of the Brotherhood of Railroad Trainmen of the State of Michigan,

Defendants and Appellants.

BEFORE THE ENTIRE BENCH

BLACK, J.

In January of 1964 this Court ordered that *State Bar of Michigan* v. *Brotherhood of Railroad Trainmen,* our Docket No. 50093, stand abeyant "pending final determination, by the Supreme Court of the United States, of the case of *Railroad Trainmen* v. *Virginia State Bar,* Docket No. 34, certiorari granted 372 US 905."[1] April 20, 1964 the Supreme Court decided the docketed cause thus brought up on certiorari. *Brotherhood of Railroad Trainmen* v. *Virginia ex rel Virginia State Bar* (1964), 377 US 1, 84 S Ct 1113, 12 L ed 2d 89. That court vacated the

1. The order is quoted in full, *State Bar of Michigan* v. *Brotherhood of Railroad Trainmen* (1965), 374 Mich at 154, 155.

injunctive decree which had been entered and affirmed in Virginia,[2] and "remanded for proceedings not inconsistent with this opinion."

October 7, 1964 No. 50093 was resubmitted. January 4, 1965 we reversed and remanded the decree which in the Jackson circuit had been entered September 14, 1962, adding this:

> "Since a public question of moment is involved, we remand with permission for amendment of plaintiff's bill to seek, if it be so advised, relief not inconsistent with the Supreme Court's said opinion." (*State Bar of Michigan* v. *Brotherhood of Railroad Trainmen*, 374 Mich 152, 155).

The ensuing events of present concern appear in *Brotherhood of Railroad Trainmen* v. *Commonwealth of Virginia ex rel. Virginia State Bar* (1966), 207 Va. 182, 149 S.E. 2d 265 (cert. den. Jan. 16, 1967, 385 U.S. 1027, 17 L. ed. 2d 675, 87 S. Ct. 754), and thereafter in the Jackson county circuit court upon remand as ordered. We take up these events in order. The *Virginia Case* and its history comes first.

Through its Commonwealth the Virginia State Bar sued the Brotherhood and others, in the Chancery Court of Richmond, Virginia, to enjoin the carrying on of a "plan" of activity which, according to the Bar, constituted the solicitation of legal business and the unauthorized practice of law in Virginia. The suit was planted upon allegation that the Brotherhood's plan is that of advising its injured members and their families to obtain legal

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2. This Virginia decree is known as "the 1962 decree." It includes the Virginia chancellor's factual findings. See footnote (1), *Brotherhood* v. *Commonwealth*, *infra*.

advice prior to making settlement of claims against their employers for injury or death; that the plan results in the channeling of legal employment to particular lawyers approved by the Brotherhood; that the Brotherhood maintains a Department of Legal Counsel for the purposes of the plan, and that the plan violates the laws of Virginia and the ethical codes of the legal profession.

The Chancery Court found that the activities of the Brotherhood pursuant to such plan consisted not only of illegal solicitation of law business but did result in "channeling all, or substantially all" of the employee versus employer business to lawyers chosen by the Brotherhood's Department of Legal Counsel. Upon these and auxiliary findings the chancellor enjoined the complained of activities in Virginia.

The highest court of Virginia affirmed summarily as against the Brotherhood's appeal to the First and Fourteenth Amendments (see *Brotherhood v. Commonwealth, supra* at 2); whereupon the Supreme Court granted certiorari to consider the constitutional question "in the light of our present decision in *NAACP* v. *Button* (1963), 371 U.S. 415, 9 L. ed. 2d 405, 83 S. Ct. 328." The plan of the Brotherhood thus enjoined was analyzed and, within the scope of the questions decided, approved by the Supreme Court in the cited decision of April 20, 1964. The Supreme Court said:

> "The result of the plan, the Brotherhood admits, is to channel legal employment to the particular lawyers approved by the Brotherhood as legally and morally competent to handle injury claims for members and their families. It is the injunction against this particular practice which the Brotherhood, on behalf of its members, contends denies them rights guaranteed by the First and Fourteenth Amendments. We agree with this contention." (p. 5).

Then the Supreme Court confronted the organized Bar Associations of the several States, and the subsequently objecting American Bar Association, with this specific ruling:

> We hold that the First and Fourteenth Amendments protect the right of the members through their Brotherhood to maintain and carry out their plan for advising workers who are injured to obtain legal advice and for recommending specific lawyers. Since the part of the decree to which the Brotherhood objects infringes those rights, it cannot stand; and to the extent any other part of the decree forbids these activities it too must fall. And, of course, lawyers accepting employment under this constitutionally protected plan have a like protection which the State cannot abridge." (p. 8).

The appellee-respondent duly petitioned for rehearing. The American Bar Association moved for leave to file a brief *amicus* in support of the petition for rehearing. The motion was granted June 1, 1964 and, on the same day, the petition for rehearing was denied. (377 U.S. 960, 12 L. ed. 2d 505, 84 S. Ct. 1625).

The proceedings on remand to Virginia appear at length in the cited 1966 decision of the Supreme Court of Appeals of Virginia. That court, seeking conformity with the Supreme Court's 1964 opinion, analyzed it with manifest care and, we add, with the deferential respect subordinates owe to their constitutional superiors.[3] Since

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3. Respect for the Supreme Court's majority opinion is not quite so evident in the December 1965 issue of Virginia Law Review, "The Brotherhood Case," p. 1693. We find portents for our case as well as restrained criticism in this paragraph (p. 1697):

the pleadings, factual record and judgment now here duplicate substantially the pleadings, factual record and now finally effective decree which in Virginia was entered on remand, we need but say that this court of another State must now determine whether that decree comports constitutionally with the aforesaid 1964 opinion. If it does, the Jackson circuit's decretal judgment of May 27, 1968 (now before us for review) should be affirmed. If not, that judgment should be reversed.

Now for the instant case. It was commenced January 28, 1959 in the Jackson circuit for injunctive relief against the same "activities"—occurring as alleged in Michigan —which in Virginia were considered by the Virginia courts and then by the Supreme Court. Decree for the State Bar having entered September 14, 1962, the *Brotherhood* appealed. As seen above, that appeal resulted in reversal and remand for further proceedings not inconsistent with the Supreme Court's opinion of 1964 *Brotherhood*.

On remand the State Bar did not avail itself of the accorded right to amend. It waited instead for disposition on remand of the *Virginia Case* and then, setting forth

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"It is submitted that the Supreme Court's opinion in the *Brotherhood* case, reflecting in its befuddling language the Court's lack of consensus, will prove of only transitory importance. However, it is hoped that it will speed the framing of clearer standards by which to judge practices similar to those advocated by the Brotherhood and sought to be regulated by Virginia. Thus, if the case reaches the Court again, little will be gained unless a definite choice is made between balancing and absolutism. It is also submitted that a balancing test is more appropriate."

the subsequent proceedings in the *Virginia Case* we have outlined, moved for entry of "a judgment in this cause in conformity to said Final Order of the Chancery Court of the City of Richmond, Virginia, as aforesaid."

Legal arguments followed, without additional proofs. The Brotherhood insisted and now insists that the Virginia decree does not conform with 1964 *Brotherhood*. The State Bar argued and argues here that the decretal judgment proposed by it and entered below May 27, 1968 conforms with the now-final Virgina decree. By-passing the Court of Appeals, we granted leave to review that judgment September 12, 1968. The appeal was submitted December 9 last.

First: Our decision will be understood better by making initial reference to a question posed and answer made by counsel during oral argument. Our answer is that when the Supreme Court denied certiorari to review 1964 *Brotherhood* that act made no precedent. Neither did it import an "expression of opinion upon the merits of the case, as the bar has been told many times" (Holmes, J., writing for the Court in *United States* v. *Carver* [1923], 260 U.S. 482, 490, 67 L. ed. 361, 43 S. Ct. 181). As written separately by Mr. Justice Frankfurter, upon denial of certiorari in *State of Maryland* v. *Baltimore Radio Show* (1950), 338 U.S. 912, 917, 94 L. ed. 562, 70 S. Ct. 252:

> "A variety of considerations underlie denials of the writ, and as to the same petition different reasons may lead different Justices to the same result. This is especially true of petitions for review on writ of certiorari to a State court."

This view, that no precedent results from denial of review, was written into our own jurisprudence as far back as 1935 (*Malooly* v. *York Heating & Ventilating Corp.*, 270 Mich. 240, 247. There it remains. See *Great Lakes Realty Corp.* v. *Peters* (1953), 336 Mich. 325, 328, 329, comment in *Williams* v. *City of Detroit* (1961), 364 Mich. 231, 288, and our order denying leave to appeal, *Frishett* v. *State Farm Mut. Automobile Ins. Co.* (1966), 378 Mich. 733, 734.

We proceed accordingly to determine whether the present Virginia decree and therefore the duplicative decretal judgment entered by the Jackson circuit,[4] are consistent with 1964 *Brotherhood*. No reliance may be placed upon the fact that, in 1967, the Brotherhood's petition for writ of certiorari was denied. The situation for us is the same as if the Brotherhood had filed no petition.

It is right to begin by saying that the adjudicatory result in Michigan *ought* to be the same as was reached finally in Virginia. Each suit as commenced, tried and reviewed has been purely equitable from the beginning. The subject matter of both is the extent to which the same planned activity of the Brotherhood comes within the constitutionally exercised jurisdiction of equity. It would reproach the tenet of equal justice under law if, in Virginia, the decree effective there should vary from the decretal relief which for our part is due to be made effective in Michigan. Starting from such premise, the thrust of which is a reasonable if rebuttable presumption that the Supreme Court is not apt to order that either the Brotherhood or our State Bar suffer or enjoy more in Michigan than do the corresponding antagonists in Vir-

4. See appendix.

ginia, we submit the following compendium of precise convictions reached by comparing *Brotherhood* as decided by the Supreme Court in 1964 with *Brotherhood* as finally settled in Virginia.

We find that the distinctive hub of 1964 *Brotherhood* turns upon desire of the Court, founded as that desire is upon the First and Fourteenth Amendments, that the Brotherhood remain free to help "injured workers or their families by recommending that they do not settle without a lawyer and by recommending certain lawyers selected by the Brotherhood * * *." (footnote 9, 377 U.S. at 5). Further, although admitting some doubt from here on, we find thoughful comparison of the 1962 decree with the succeeding 1966 decree as entered successively in Virginia, that the highest court of that State has fairly eliminated such of the objections to the 1962 decree as were made by the Brotherhood and upheld by the Supreme Court. See the successive major excisions from the 1962 decree which Virginia's Supreme Court of Appeals directed, all italicized by the court and portrayed by footnote (4), 207 Va. at 187, particularly the elimination of the 1962 banning of solicitation.

The conclusion reached by the Virginia Supreme Court of Appeals reads (207 Va. at 189):

> "[2] We interpret the opinion as denying the State's right to restrain these activities. The Court held that the Brotherhood's activities fell within the protection of the First Amendment guarantees of free speech, petition and assembly. In the Court's opinion, the State had failed to show any appreciable public interest that would justify restraint of the Brotherhood's pursuit of constitutionally protected activities."

All this considered, nothing appears in the Supreme Court's opinion that declares or portends greater constitutional regulation of the practice of law than does the quoted interpretation of the Supreme Court's general if not possibly uncertain language.[5] We decline accordingly to impute to that Court intent that the Brotherhood of Railroad Trainmen should receive more First and Fourteenth Amendment protection than the State of Virginia now provides for it. Holding, then, that the Jackson circuit's decretal judgment of 1968 is in accord with the present Virginia decree, we align ourselves with that decree. In short, this Court is not ready—absent a specific order forwarded from Washington—to grant the Brotherhood more relief in Michigan than it has obtained thus far in Virginia.

Second: The Brotherhood insists that the 1968 decretal judgment denies it the constitutional protection which, in *United Mine Workers of America* v. *Illinois State Bar Ass'n.* (1967), 389 U.S. 217, 19 L. ed. 2d 426, 88 S. Ct. 353, was accorded the *Mine Workers' plan* of hiring an attorney on a salary basis to represent its members and their dependents in connection with claims for benefits under the Illinois Workmen's Compensation Act. We do not agree. The narrow question in *Mine*

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5. No disrespect is intended. The 1965 writer for the Virginia Law Review may indeed have been right (ante at ——) in observing that the Supreme Court's opinion was couched to obtain some semblance of a consensus. If true, let it be noted that we too know all about that fact of judicial life and the occasional need it creates. See our recent contributory consension of generality signed by 4 Justices only, in the *Third Circuit Case,* December 8, 1969, 383 Mich. ——.

Workers was whether "the operative portion" of the scrutinized Illinois decree, prohibiting "any financial connection between the attorney and the Union," and such other parts of the decree as might be viewed as forbidding that "connection," passed muster under the First and Fourteenth Amendments. The Supreme Court ruled negatively and, as in 1964 *Brotherhood,* vacated the Illinois judgment and decree with remand for further consistent proceedings. The 1968 decretal judgment includes no such prohibition, nor does the Virginia decree of June 13, 1966.

Here we decline to extend or apply *Mine Workers* to our question; a question which in 1965 was sent back to the Jackson circuit for consistency with the 1964 *Brotherhood Case*—that only.

The 1968 decretal judgment, a copy of which we have appended, is affirmed. No costs.

Thomas E. Brennan, C. J.; Harry F. Kelly, J.; John R. Dethmers, J.;

Concurred with Eugene F. Black, J.

APPENDIX

(Decretal Judgment Entered May 27, 1968, by the Jackson County Circuit Court.)

"This court having heretofore and on the 14th day of September, 1962, entered its decree in favor of plaintiff and against defendants in this cause and said decree having been appealed to the Supreme Court of Michigan and having been remanded to this court for proceedings, not inconsistent with the decision of the United States Supreme Court in the case of *Commonwealth of Virginia ex rel Virginia State Bar* v. *Brotherhood of Railroad Trainmen,* and plaintiff having filed motion to enter judgment, to which motion a copy of said proposed judgment was attached and the court having heard the arguments of counsel, and having duly considered said motion and proposed judgment and being fully advised in the premises,

"Therefore, on motion of counsel for plaintiff, it is ordered and adjudged that defendants herein be, and they are now permanently restrained and enjoined from giving or furnishing legal advice to its members or their families; from informing any lawyer or lawyers that an accident has been suffered by a member or non-member of the said Brotherhood and furnishing the name and address of such injured or deceased person for the purpose of obtaining legal employment for any lawyer; from stating or suggesting that a recommended lawyer will defray expenses of any kind or make advances for any purpose to such injured persons or their families pending settlement of their claim; from controlling, directly or indirectly, the fees charged or to be charged by any lawyer; from accepting or receiving compensation of any kind, directly or indirectly, for the solicitation of legal employment for any lawyer, whether by way of salary,

commission or otherwise; from sharing in any manner in the legal fees of any lawyer or countenancing the splitting of or sharing in such fees with any layman or lay agency; and from sharing in any recovery for personal injury or death by gift, assignment or otherwise."

ADAMS, Justice (dissenting).

This action was begun on January 28, 1959 by the State Bar of Michigan charging the Brotherhood of Railroad Trainmen, through the operation of its Legal Aid Department (subsequently renamed Department of Legal Counsel), with unlawfully and improperly soliciting large numbers of cases and claims of members of the Brotherhood of Railroad Trainmen and directing those cases to Regional Counsel Henslee and associates in Chicago, Illinois.

The defendants admitted that in many instances, but not in all, a "member of the defendant Trainmen calls upon, contracts, or in some other manner explains to an injured member employee, or his bereaved family, the advisability of obtaining a lawyer, or the opinion of a lawyer, and recommends that they consult with the Legal Counsel designated, and further recommends that the Legal Counsel be retained if a lawyer is to be retained.

The issue as framed by Mr. Phillip C. Kelly, acting as attorney for the State Bar, was "whether or not a large volume of these cases arising in Michigan reached the office of Regional Counsel Henslee and associates in Chicago over a period of several years during the operation of this legal department."

On June 27, 1961, a hearing was held before the Circuit Judge at which time Mr. David J. Walsh, Supervisor of

the Clearing House for the Claims Research Bureau, General Claims Division, of the Association of American Railroads, testified. The testimony of Mr. Walsh consisted of records of FELA claims compiled by the Association of American Railroads and tended to establish that during the period July 1, 1953 through the year 1960 there were 482 such cases and that 218 were handled by the Henslee firm.

Additional history of this case is contained in *State Bar of Michigan* v. *Brotherhood of Railroad Trainmen* (1965), 374 Mich. 152, 132 N.W. 2d 78, and in the opinion of Justice Black upon this present appeal.

In *Brotherhood of Railroad Trainmen* v. *Virginia, ex rel. Virginia State Bar* (1964), 377 U.S. 1, p. 8, 84 S. Ct. 1113, p. 1118, 12 L. Ed. 2d 89, the United States Supreme Court said:

> "We hold that the First and Fourteenth Amendments protect the right of the members through their Brotherhood to maintain and carry out their plan *for advising workers who are injured to obtain legal advice and for recommending specific lawyers.* Since the part of the decree to which the Brotherhood objects infringes those rights, it cannot stand; and to the extent any other part of the decree forbids these activities it too must fall. And, of course, lawyers accepting employment under this constitutionally protected plan have a like protection which the State cannot abridge." (Emphasis added.)

On December 5, 1967, the United States Supreme Court spoke again in the case of *United Mine Workers of America, District 12* v. *Illinois State Bar Association, et al* (1967), 389 U.S. 217, 88 S. Ct. 353, 19 L. Ed. 2d 426. In that case the United States Supreme Court held (pp. 221, 222, 88 S. Ct. p. 355):

> "We hold that the freedom of speech, assembly, and petition guaranteed by the First and Fourteenth Amendments gives petitioner the right to hire attorneys on a salary basis to assist its members in the assertion of their legal rights."

I agree with Justice Black that when the United States Supreme Court denied certiorari in 1967 to review *Brotherhood of Railroad Trainmen* v. *Commonwealth of Virginia ex rel. Virginia State Bar* (1966), 207 Va. 182, 149 S.E. 2d 265, that act made no precedent. I disagree with Justice Black that the decretal judgment entered May 27, 1968 by the Jackson County Circuit Court is consistent with 1964 *Brotherhood* or 1967 *United Mine Workers.*

Even if the decree could be sustained under the decision in *Railroad Trainmen,* it seems clearly evident that the decree is in plain violation of the holding of the United States Supreme Court in *United Mine Workers.*

I would vacate the judgment for the further reason that this is a chancery case in which the State Bar of Michigan seeks injunctive relief. The State Bar failed to amend or update its complaint upon remand by this Court and it failed to produce any proofs, other than the testimony of Mr. Walsh relating to the period from July 1, 1953 through the year 1960. Neither the trial court nor this Court should afford injunctive relief upon proofs as stale as these, the very most recent of which relate to a period 10 years ago. Furthermore, the evidence is wholly inadequate to sustain the injunctive relief which was granted.

We have repeatedly cautioned against granting injunctive relief prior to full hearing and clear and convincing proofs. See: *Cross Company* v. *UAW Local No.* 155 (AFL-CIO) (1963), 371 Mich. 184, 123 N.W. 2d 215; *School District for the City of Holland* v. *Holland Education Association* (1968), 380 Mich. 314, 157 N.W. 2d 206.

I would reverse the trial court and vacate the decretal judgment which it entered.

T. M. KAVANAUGH and T. G. KAVANAUGH, JJ., concurred with ADAMS, J.

APPENDIX E

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN,

Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the 9th day of March in the year of our Lord one thousand nine hundred and seventy.

Present the Honorable Thomas E. Brennan, Chief Justice; John R. Dethmers, Harry F. Kelly, Eugene F. Black, Thomas M. Kavanagh, Paul L. Adams, Thomas G. Kavanagh, Associate Justices.

52106

The State Bar of Michigan,

Plaintiff,

vs.

The Brotherhood of Railroad Trainmen, et. al.,

Defendants and Appellants.

This cause having been brought to this Court by appeal from the circuit court for the county of Jackson, and having been argued by counsel and due deliberation had thereon, IT IS NOW ORDERED by the Court that the judgment entered May 27, 1968 by the Jackson county circuit court be and the same is hereby AFFIRMED. It is further ordered that no costs be allowed.

STATE OF MICHIGAN—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 7th day of April in the year of our Lord one thousand nine hundred and seventy.

Donald F. Winters, Clerk.